United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2087

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
RONALD MILLER,

Appellant,

-against-

LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Appellee.

Docket No. 75-2087

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

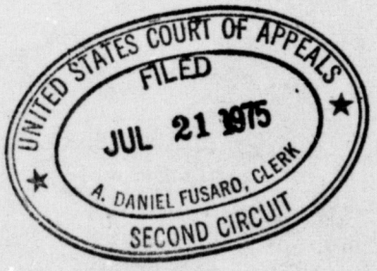

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES CITED

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QUESTIONS PRESENTED

1. Whether the District Court applied the wrong standard in determining whether the issue of the State's failure to introduce any evidence as to essential elements of the felony murder charge was of constitutional dimension.

2. Whether Miller's felony murder conviction, based on a record which lacks any relevant evidence of essential elements of that crime, violates due process.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Milton Pollack) rendered December 17, 1974, denying without a hearing relator-appellant Miller's pro se petition for a writ of habeas corpus. On June 23, 1975, this Court granted Mr. Miller's motion for assignment of counsel, a certificate of probable cause, and leave to proceed in forma pauperis, and assigned The Legal Aid Society, Federal Defender Services Appeals Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The State Trial

On November 19, 1970, appellant Miller was indicted in a three-count indictment for the felony murder of one Rasul Aleem (Count I); the common law murder of Aleem (Count II); and the attempted murder of one Robert Fennell (Count III). The predicate felony charged in Count I was burglary.

The trial commenced on July 8, 1971. The State's principal witness, Robert Fennell, testified that at approximately 9:00 a.m. on the morning of October 25, 1970, he and his room-

mate, Rasul Aleem, were sitting in their apartment drinking wine when they heard a knock on the door (241, 249*). Fennell went to the door and, without opening it, inquired who was there (241). The answer was, "It's Ronald" (241). Fennell knew Ronald to be appellant, Ronald Miller, one of the residents of the apartment above Fennell's apartment. Fennell testified that he and Miller had been "friendly neighbors" and had visited each other occasionally (302-303). Fennell therefore opened the door (241).

According to Fennell, Miller thereupon sprayed him with mace and began stabbing at him with a knife (242). Fennell first stepped backward and then tripped on a rug, falling on his back (242-243). As Miller was bending over him, Aleem came up behind Miller and hit him with a lead pipe (243-244). Responding to the blow, Miller half turned his body, raising his right arm between himself and Aleem. In so doing, the knife in Miller's right hand struck Aleem, fatally wounding him (244).

Miller testified in his own defense, stating that he had never before been convicted of any crime (589). Miller had been employed for five years prior to October 25, 1970, as a security guard for Lavity Detective Bureau and had worked the previous night in that capacity from 7:00 p.m. to 4:00 a.m. (519-521). Thereafter he and Mattie Zigler, with whom he

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*Numerals in parentheses refer to pages of the transcript of the State court trial.

shared an apartment, had proceeded to a nearby party (523). Miller testified that at the party and during the events following it he was wearing his work clothes, in the pocket of which was a container of mace which he carried in connection with his work (523, 548).

Miller and Zigler returned from the party to their apartment at approximately 7:30 a.m., Miller bringing with him two fried chicken dinners (525). Inside the apartment, Zigler went into the bathroom (531), and Miller eventually went into the kitchen to cut up the chickens (534). While Miller was so engaged, Zigler opened the bathroom door and told Miller that Robert Fennell was calling to him from downstairs (534).*

Miller thereupon proceeded downstairs to Fennell's apartment, carrying with him the knife he had been using to cut up the chickens (535). Miller testified that he did not realize he had the knife with him (583) and did not go to Fennell's apartment with the intention of assaulting him (561).

When Miller reached Fennell's apartment, he knocked on the door and heard Fennell ask, "Who is it?" Miller replied, "Ronald." Fennell then opened the door and Miller entered the apartment, the door closing behind him (536). When Miller asked Fennell what he wanted, Fennell started toward him, saying, "You know damn well what I want" (541). At Fennell's

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*Mattie Zigler, testifying for the State, confirmed Miller's claim that Fennell had called up to him to come downstairs (163-168). Fennell, in his testimony, denied having made such a request (241).

approach, Miller turned and attempted to leave the apartment (542). The door, however, had no doorknob, and Miller could not get out.* By this time Fennell, having reached him, caught Miller's hand, which was holding the knife in a downward position, and began pulling him backwards. Miller then took the mace container from his pocket and sprayed it at Fennell (543) as Fennell continued to pull Miller's hand. Miller was dragged backward and, as Fennell suddenly slipped on a rug (614), both men fell to the floor. Miller at first fell flat on top of Fennell, then managed to get to his knees (552). Just then he was hit on the head by Aleem with a pipe. Throwing his arm back, Miller tried to push Aleem out of the way, expecting to be hit again. In so doing, he unintentionally struck Aleem with the knife in his hand. Fennell said, "Look what you done! ... You killed my friend!" Miller said, "Oh, my God," and got to his feet. Hearing Zigler calling to him from outside the door, Miller told her to go for the police as he could not get out (556).

Then Fennell opened the door and Miller went into the hallway, waiting there until the police arrived (557). When the police asked him what had happened, he told them it was an accident (559).

Motions were made to dismiss the first, second, and third

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*Fennell himself testified that at times a screwdriver was required to open the door (251).

counts of the indictment. Motions as to the third count were denied, but decision on the motion as to the first count was reserved, a colloquy having taken place in which the judge at first indicated that he saw no prima facie case for felony murder (502). Later, however, the trial judge denied the motion as to the first count as well (634).

Thereafter, during the jury's deliberations, a question was sent in regarding the three charges and their relationship (779). The jury then asked for a definition of unlawful entry or remaining (780). In response, the trial judge read the jury his burglary charge, almost exactly as previously given. The jury later entered the courtroom and informed the court that a verdict had been reached on the third count only, finding Miller guilty of first-degree assault as to Fennell (782). The jury again retired and some time later asked a question referring to the second count. At that time the jurors were asked for their verdict on the first count. The foreman said they had reached a verdict of guilty of felony murder, whereupon several jurors shook their heads, indicating disagreement. The judge stated he would not accept the verdict until agreement could be reached as to both the first and second counts (794). Finally, after some five hours of deliberation, the jury returned a verdict convicting Miller of felony murder under Count I and acquitting him of common law murder (Count II, convicting him rather of the lesser-included crime of manslaughter (795, 796).

Thereafter, Miller moved to set aside the verdict.* The motion was granted to the extent of setting aside the verdict as to the first count of the indictment.

At sentencing on November 8, 1971, the court announced its decision* to set aside the first count of the indictment:

> In my opinion you did not prove a burglary. ... [There was] never any intention of a burglary, because nobody, including the defendant, intended to burglarize. I don't stretch the law that way to accuse this fellow of -- to find this fellow guilty of a burglary in order to have him guilty of murder when ther's no more an intent to murder here than the man in the moon.
>
> * * *
>
> He was invited downstairs and a fight ensued. He didn't attempt to go in unlawfully. The only thing that closely resembles a burglary, you can say he had an intent to commit an assault, and I don't include assault as one of the charges that produce felony murders.
>
> * * *
>
> ... Fennell testified that he opened the door after the defendant knocked; that nobody forced his way in. Mattie Zigler testified that the defendant was asked to come down to the victim's apartment. She heard him called by Fennell.
>
> (S.5, 6, 7**).

Moreover, on the question of the jury's finding of a felony murder as a matter of fact, the court stated:

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*Defense counsel made this motion orally immediately after the verdict was rendered. Mr. Justice Baer requested that it be made on papers and expressed his intention to grant it (804).

**Numerals preceded by "S" in parentheses refer to pages of the transcript of the sentencing proceeding November 8, 1971.

***The opinion of the trial court is set forth as "E" to appellant's separate appendix.

> If you want to know, I have letters from jurors who said that they don't consider that this is murder, but under the charge they felt they had no alternative but to find him guilty of felony murder.
>
> (S.8).

Miller was then sentenced on Counts II and III of the indictment to five years' imprisonment on each count, the sentences to run concurrently (S.13).

B. The Appeals Proceedings

The State appealed from the trial court's dismissal of the felony murder conviction. The Appellate Division, affirming (39 A.D.2d 893 (1st Dept. 1972)), wrote:

> Assault is not one of the specified felonies forming a basis for a felony murder (Penal Law, §125.25 subd. 3); and the evidence adduced on the trial should "not be warped or strained" to find another independent felony [burglary based on assault] in order to sustain this conviction [citation omitted]. Such was not the intent of the legislature.

(A copy of the opinion of the Appellate Division is "D" to appellant's separate appendix). The Court of Appeals reversed, holding that a burglary based on the crime of assault can be a predicate for a felony murder conviction. 32 N.Y.2d (1973). (A copy of the opinion of the Court of Appeals is "C" to appellant's separate appendix). The Court of Appeals thus ordered the trial court to reinstate the felony murder conviction. The trial judge subsequently

did so, and imposed the mandatory sentence of fifteen years to life, stating at that proceeding that he felt the result was unjust and did not reflect Miller's degree of culpability (Transcript of May 15, 1973, at 4-6).

Miller's appeal from this reinstatement was consolidated with his appeal from the convictions on the other two counts. While that appeal was pending, Miller filed the Federal habeas corpus petition which is the subject of the present proceeding.

Included in the issues raised in Miller's habeas corpus application was the argument that the State had failed to introduce any evidence as to an essential element of the felony murder charge. Since the predicate felony on which this charge rested was burglary, the State was required to establish that Miller "knowingly" entered or remained in Fennell's apartment unlawfully, rather than under the belief that he was "licensed" to so enter. Absent any evidence on that element of the crime, the conviction could not stand (Petition at V-VII).

On December 17, 1974, the District Court denied the petition. (A copy of the District Court's opinion is "B" to appellant's separate appendix). Although holding that certain of the other issues raised by Miller had not been exhausted by virtue of his still pending State appeal, the District Court found that the issue of the State's failure to prove an essential element of the felony murder charge had been exhausted (Opinion at 1). The District Court refused to decide the

merits of this issue, however, on the ground that such an issue did not "rise to Federal constitutional dimensions unless there was no proof whatsoever of the crime charged -- a condition which is not met in this case" (Opinion at 2). The District Court then proceeded to decide the other issues raised in the petition, "assuming that [Miller] had exhausted his State remedies" as to those issues (Opinion at 1).

On February 18, 1975, the Appellate Division, First Department, affirmed Miller's consolidated States appeal without opinion, and on April 29, 1975, the Court of Appeals denied leave to appeal.

ARGUMENT

Point I

THE DISTRICT COURT APPLIED THE WRONG STANDARD IN DETERMINING WHETHER THE ISSUE OF THE STATE'S FAILURE TO INTRODUCE ANY EVIDENCE AS TO ELEMENTS OF THE FELONY MURDER CHARGE WAS OF CONSTITUTIONAL DIMENSION.

One of the issues raised by Miller in his habeas corpus application was that the State had failed to introduce any evidence to show that he had "knowingly" entered or remained in Fennell's apartment "unlawfully," rather than under the belief he was invited or "licensed" to enter. Absent such proof, the State failed to present any evidence as to essential elements of the predicate felony -- burglary -- underlying this felony murder conviction.

The District Court held that Miller had exhausted his State remedies as to this issue, but refused to decide its merits on the ground that such an issue did not "rise to Federal constitutional dimensions unless there was no proof whatsoever of the crime charged -- a condition which is not met in this case" (District Court Opinion at 2). In so holding, the District Court applied the wrong standard to this case.

Clearly, a conviction resting on a record in which there is no proof whatsoever of the crime charged is violative of constitutional due process guarantees. Johnson v. Florida,

319 U.S. 596 (1968); Thompson v. Louisville, 362 U.S. 199 (1960). It is equally clear, however, that

> "... a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged would violate due process."
>
> Vachon v. New Hampshire, 414 U.S. 478, 480 (1974), quoting Harris v. United States, 404 U.S. 1232, 1233 (1971). Emphasis added.

See also United States v. Liguori, 438 F.2d 663, 669 (2d Cir. 1971); cf. United States v. Travers, Doc. No. 74-1737, slip opinion 805, 816 (2d Cir., December 16, 1974).

The District Judge, in articulating the standard he applied in this case, cited this Court's decision in United States ex rel. Terry v. Henderson, 462 F.2d 1125 (2d Cir. 1972), as its sole authority. Although that case does state that such a claim does not rise to constitutional dimensions "unless there was no proof whatever of the crime charged" (id., 462 F.2d at 1131), it is respectfully submitted that Terry is not controlling here. First, this Court, in Terry, found that the record revealed sufficient evidence as to every element of the crime charged (id., 462 F.2d at 1131). The above-quoted standard was mere dicta as to that case, and consequently is not contolling here. More important, however, since that dicta is directly contradictory to the standard set down by the Supreme Court in Vachon v. New Hampshire,

supra, and Harris v. United States, supra, this Court is obliged to follow those decisions rather than the dicta of Terry.

Since Miller alleged in his petition that the State presented no evidence to establish essential elements of his felony murder conviction, he raised an issue of constitutional dimension. The District Court therefore erred in refusing to decide the merits of that claim. Although this Court might elect to remand this case to the District Court with instructions that that court now consider the merits of the issue under the correct standard, it is respectfully submitted that the interests of justice would be better served by this Court's deciding the merits of the claim on the basis of the record now before it. United States v. Travers, supra, slip opinion at 808; cf. United States v. Seijo, Doc. No. 74-2313, slip opinion 3039, 3042 fn.1 (2d Cir., April 23, 1975).

It is significant that the standard articulated in the dicta of United States ex rel. Terry v. Henderson, supra, and applied by the District Court in this case was also the standard advanced in the dissenting opinion in Vachon v. New Hampshire, supra, 414 U.S. at 484. Thus, Vachon clearly establishes that a majority of the Supreme Court has rejected the standard applied by the District Court in this case in favor of the standard advocated by appellant Miller in this appeal.

Point II

MILLER'S FELONY MURDER CONVICTION, BASED ON A RECORD WHICH LACKS ANY RELEVANT EVIDENCE OF ESSENTIAL ELEMENTS OF THAT CRIME, VIOLATES DUE PROCESS.

Miller was convicted of felony murder which, under New York State law, requires proof that the accused caused the victim's death while in the course of committing one of several specific felonies. New York Penal Law, §125.25. Interpreting the evidence presented at trial in the light most favorable to the prosecution, its case showed that Miller accidentally killed one Aleem while assaulting Robert Fennell.* Under New York State law, however, assault cannot serve as the predicate crime for a felony murder charge.** Consequently, the State, in order to charge this more serious offense, claimed that Miller was committing a burglary at the time he caused Aleem's death, burglary being one of the crimes which can serve as a predicate for felony murder.

The jury reluctantly convicted Miller of felony murder on this theory (Trial Transcript at 779-796; Sentencing Min-

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*That the slaying was accidental rather than intentional is established by the jury's verdict on Count II of the indictment, in which it acquitted Miller of the common law murder of Aleem, convicting him rather of manslaughter in the second degree.

**Those crimes which can serve as a predicate for felony murder include robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first and second degree. New York Penal Law, §125.25, subd. 3.

utes at 8). Both the trial court, in setting aside Miller's conviction for felony murder, and the Appellate Division, in sustaining the trial court's action, found that the State's claim of burglary "warped and strained" the evidence the State had presented at trial (Opinion of the Appellate Division at 893; see also the opinion of the trial court, Sentencing Minutes at 5-7). The New York Court of Appeals reinstated the felony murder conviction. In so doing, it committed error of constitutional dimension, since the State presented no evidence at Miller's trial to establish essential elements of the predicate burglary.

Under New York law, the State must prove four elements to sustain a conviction for burglary: (1) that the defendant "entered or remained unlawfully;" (2) that he "knowingly" did so; (3) that the invaded premises constituted a "building;" and (4) that the defendant knowingly entered or remained in the building "with intent to commit a crime therein." New York Penal Law, §140.20, and Practice Commentaries. In the present proceeding, the trial record contains no evidence to establish the first two elements of this underlying crime.

Although the jury might have inferred from the evidence that the State presented that Miller entered Fennell's apartment with intent to assault Fennell, that evidence goes only to the fourth element of the crime and provides no support for either of the first two elements. A defendant who enters a premises with intent to commit a crime does not, by that

intent, render his entry unlawful or negate any privilege or invitation to enter:

> Thus, a person who mistakenly believed that he was licensed or privileged to enter a building would not be guilty of burglary, even though he entered with intent to commit a crime therein. (Cf. People v. Calloway, 1948, 297 N.Y. 931...).
>
> New York Penal Law, §140. 20, Practice Commentaries.

See also People v. Brown, 25 N.Y.2d 374, 376 (1969); People v. Ennis, 37 A.D.2d 573 (2d Dept. 1971).

Thus, even if Miller entered Fennell's apartment with intent to assault Fennell, that fact did not render Miller's entry "unlawful." Rather, the State was required to prove independently an unlawful entry or trespass. Moreover, in meeting that burden, the State was also required to present evidence to establish that Miller was not privileged or invited to enter Fennell's apartment:

> In both criminal trespass and burglary prosecutions, the absence of a license or a privilege is an essential element of the offense, to be pleaded and proved by the people, i.e., it is not simply a matter of defense. (People v. Barton, 1962, 18 A.D. 2d 612...; People v. Popack, 1964, 14 N.Y. 2d 566...).
>
> New York Penal Law, §140. 00, Practice Commentaries, subd. 5.

In the present proceeding, the State failed to prove that Miller lacked privilege or invitation to enter Fennell's apartment. Similarly, the State failed to present any evidence to

show that Miller's entry was knowingly unlawful. This is not a case in which the defendant entered the apartment without the knowledge of its occupant. Nor is it a case in which a stranger, through misrepresentation, deceives the apartment's occupant into opening the door to him. According to the State's own evidence, Fennell knew Miller as one of the occupants of the apartment upstairs. Fennell testified that they were "friendly neighbors" and had visited each other occasionally. According to both a prosecution witness and the defendant, Fennell asked Miller to come down to his apartment on the morning in question. Although Fennell denied this prior invitaiton, he did acknowledge that when Miller knocked on the door and identified himself, Fennell opened the door to him. This testimony as to past visits and Fennell's action in opening the door when he ascertained it was his upstairs neighbor who was knocking are indicative of a privilege or invitation for Miller to enter the apartment. It provides no evidence whatsoever of the absence of such invitation or a knowingly unlawful entry.* The absence of any evidence of knowing un-

lawful entry was what led the trial court to set aside the felony murder conviction:

> [Miller] didn't attempt to go in[to Fennell's] apartment unlawfully. The only thing that closely resembles a burglary, you can say he had an intent to commit an assault, and I don't include assault as one of the charges that produce felony murders.... Fennell testified that he opened the door after the defendant knocked; that nobody forced his way in.
>
> Sentencing Minutes 5-7.

If, as Fennell testified, Miller thereupon assaulted him, then Miller is guilty of assault, as the jury found in convicting him on Count III. There is no evidence, however, that he was guilty of the knowing unlawful entry required to sustain a felony murder conviction based on burglary.

Given the absence of any evidence to show a knowing unlawful entry, the jury's determination that Miller was guilty of felony murder appears to be the product of the trial court's failure to instruct the jury that the entry was not rendered knowingly unlawful merely because the defendant entered Fennell's apartment with the intent to commit a crime. Absent such a clarifying instruction, the jury was free improperly to infer that the State had proved knowing unlawful entry merely because the State had shown an entry with intent to commit a crime.

The trial judge, after originally setting aside the felony murder conviction, sentenced Miller to five years' imprisonment on the manslaughter and assault convictions. When he was in-

structed to reinstate the felony murder conviction, he was reluctantly obliged to triple Miller's sentence to fifteen years' imprisonment, the statutory minimum for the offense. The reinstatement of the felony murder conviction on a record which discloses no evidence of the requisite elements of unlawful entry, knowledge of unlawful entry, and the absence of privilege or invitation to enter, is in violation of Miller's due process protections. Vachon v. New Hampshire, supra; Harris v. United States, supra. Consequently, the writ of habeas corpus should be issued as to that conviction.

CONCLUSION

For the foregoing reasons, the order of the District Court denying the writ of habeas corpus should be reversed and the writ granted.

Respectfully submitted,

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July 21, 1975

CERTIFICATE OF SERVICE

7/21/75, 19

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

E. Thomas Boyle